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ABSTRACT

On December 22, 1983, the Federal Communications Commission formally ended its consideration of rule making for children's television programing. Opponents of government regulation view the FCC's decision as a victory for the First Amendment freedoms of speech and the press; proponents of mandatory children's programing guidelines feel that the FCC has mortgaged the nation's youth in favor of marketplace economics and media lucre. In reaching its decision, the FCC criticized the failure of the children's task force to consider the growth in raw numbers of commercial television stations and the increased receivability of television signals, nonbroadcast sources of children's programing, cable programing, and the availability of "family" entertainment on commercial broadcast stations. Despite contradictory evidence, the FCC concluded that the task force studies did not support a case for increased regulatory concern or involvement in the area of children's television. Clearly the FCC felt strongly that continuing oversight of individual licensee programing for children was wrongheaded. However, by relying on misrepresentations and questionable legal logic, the Commission has invited a court challenge. (HOD)

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THE IGNOMINIOUS DEATH OF FCC DOCKET 19142: ENDING THE CRUSADE FOR CHILDREN'S TELEVISION

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THE IGNOMINIOUS DEATH OF FCC DOCKET 19142: ENDING THE CRUSADE FOR CHILDREN'S TELEVISION

Introduction.

On December 22, 1983, the Federal Communications Commission terminated one of the longest standing dockets pending at that agency.[1] With its action on that date, the Commission formally ended its children's television proceeding, and, in so doing, left the viewing fate of the nation's youth to the economic realities of the commercial television marketplace. The proceeding began, unassumingly enough, in 1970, when a group of concerned parents and professionals known as Action for Children's Television (ACT) filed a petition for rule making at the Commission.[2] ACT's original petition proposed a rule that would have required commercial television broadcasters to air a minimum amount of age-specific, educational programming for children on a weekly basis. The petition also asked the Commission to establish regulations intended to protect child viewers from deceptive advertising practices.

Unbeknownst at the time to the Commission, the filing of the ACT petition struck a nerve among United States citizens. From the time the Commission adopted its first Notice of Inquiry on the children's television issue in 1971,[3] until the proceeding was finally terminated in 1983, the agency received comments from over 112,000 individuals and entities, from pre-school aged children and concerned parents and grandparents, from program producers and television networks, and from academics and researchers representing all conceivable points of view. Proponents of government regulation of children's television were treated to highs in 1974 when the Commission announced its Children's Television Policy Statement[4] and again in 1978 when then-Chairman Charles Ferris reinstituted the children's task force and seemed to support mandatory programming

guidelines. Those same groups experienced lows in the mid-seventies when it became clear that the 1974 Policy Statement had no teeth and again this past December when the Commission formally washed its collective hands of the children's television issue. Opponents of government regulation view the Commission's decision as a victory for the First Amendment freedoms of speech and the press; proponents of mandatory children's programming guidelines feel that the Commission has mortgaged the nation's youth in favor of marketplace economics and media lucre.

The Thirteen Year History of Docket 19142

The petition for rule making filed by Action for Children's Television in 1970 called on the Commission to adopt the following specific guidelines for all children's television programming:

> (a) There shall be no sponsorship and no commercials on children's television;
>
> (b) No performer shall be permitted to use or mention products, services or stores by brand names during children's programs (host selling), nor shall such names be included in any way during children's programs (tie-ins);
>
> (c) Each station shall provide daily programming for children and in no case shall this be less than 14 hours a week, as part of its public service requirement. Provision shall be made for programming in each of the age groups specified below, and during the time periods specified: (i) pre-school (ages 2-5) 7 a.m. - 6 p.m. daily, 7 a.m. - 6 p.m. weekends; (ii) Primary (ages 6-9) 4 p.m. to 8 p.m. daily, 8 a.m. to 8 p.m. weekends; (iii) Elementary (ages 10-12) 5 p.m. to 9 p.m. daily, 9 a.m. to 9 p.m. weekends.[5]

In addition to seeking comment on these particular suggestions, the first Notice of Inquiry in this proceeding requested a discussion of the proper definition of "children's programs," separation of advertising from programming content, and current children's television practices.[6]

The Commission's initial foray into the regulation of children's television programming resulted in the 1974 Report and Policy Statement.[7] Although the

Policy Statement did not go as far as Action for Children's Television would have liked, the document was remarkable in that, for the first time, the Commission had isolated an identifiable segment of society and had set forth detailed programming policies to serve that audience. The Commission justified this unprecented action by stating:

> As we have long recognized, broadcasters have a duty to serve all substantial and important groups in their communities, and children obviously represent such a group. Further, because of their immaturity and their special needs, children require programming designed specifically for them. Accordingly, we expect television broadcasters as trustees of a valuable public resource, to develop and present programs which will serve the unique needs of the child audience.[8]

Thus, the Commission recognized that children were unique among all significant segments of the community. The element that made them unique was their age: children simply do not possess the cognitive abilities of adults.[9] Due to this cognitive difference, the Commission felt secure in its pronouncements on broadcasters' special obligations to serve children.

Having found that the child viewer was worthy of special attention, the Commission proceeded to list what was expected of all commercial television licensees. Broadcasters were expected to make a "meaningful effort" to program material designed and intended for the child audience.[10] Additionally, the Commission stated that licensees should present a "reasonable amount" of programming designed to "educate and inform -- and not simply to entertain."[11] Licensees were encouraged to make a "meaningful effort" to air programs that were "age-specific," that is, programs that were geared especially to the cognitive levels of both pre-school children and school age children.[12] The Commission further stated that the practice of broadcasting a majority of children's fare on weekend mornings was unreasonable. Studies proved that most child viewing occurred during the week. Therefore, the Policy Statement made it clear that "considerable improvement" was to be made in the scheduling of

children's programming.[13]

In the advertising realm, after noting the primary responsibility of the Federal Trade Commission to oversee false and deceptive advertising, the Commission assumed jurisdiction over some areas of children's advertising. The Commission reviewed its general policy against overcommercialization on broadcast stations and averred that this policy was even more important with respect to children's programming given children's cognitive limitations.[14] However, the Commission declined to mandate the elimination of commercial content from children's programming as ACT requested. According to the Policy Statement, the Commission thought it unreasonable for broadcasters to improve children's fare while at the same time denying broadcasters the major source of funding for such programming.[15] The Commission noted with approval the attempts of the National Association of Broadcasters and the Association of Independent Television Stations to engage in self regulation through the adoption of voluntary industry codes relating to the amount of commercialization that was appropriate for children's programs. Rather than adopting per se rules, the Commission opted for a wait-and-see approach in order to assess the effectiveness of the industry guidelines.

The Commission also addressed several advertising content issues. The Commission recognized that young children have considerable difficulty distinguishing commercial matter from program material. Accordingly, the Commission stated that fundamental fairness dictated that a clear separation between commercial content and program matter was required in order to aid the child in developing an ability to distinguish between the two forms of message. The Commission asserted that either an aural announcement or a clearly distinguishable visual sign or both should be used for this purpose.[16]

The Commission also expressed some concern for the practice known as "host selling." Host selling involves the use of program characters to promote particular products. This, according to the Commission, takes unfair advantage of the difficulty children have distinguishing advertising from programming, and plays on the child's trust in particular media personalities. Thus, the Commission stated that the use of a program host or other program personality to promote products in the program in which he appears is inconsistent with a licensee's obligation to program in the public interest.[17] Similarly, the Commission discouraged the use of product "tie-ins" during the course of an entertainment program. Tie-ins were defined as engaging in practices in the body of a program that promote particular products in such a way that they might constitute advertising. This was viewed as another device that was intended to play on the inexperience of young viewers. The Commission stated that licensees that engage in program practices which involve the mention or prominent display of brand names in children's programs should "reexamine such programming in light of their public service responsibilities to children."[18]

The Commission concluded its Policy Statement by asserting that no government regulation could create a commitment to quality children's programming. The Commission felt that self regulation was the most promising approach to the children's television dilemma. The standards suggested by the Commission in the Policy Statement would be monitored for compliance at renewal time, but no compulsory rules were established.[19] As broadcasters and the public soon discovered, the combination of vague and unquantifiable standards such as "reasonable amount" and "meaningful effort" plus the lack of per se rules to force compliance resulted in an ineffective and highly flaunted policy -- at least with respect to the children's programming guidelines.[20]

Rather than terminating docket 19142 in 1974, the Commission left the proceeding open so that industry's compliance with the Policy Statement could be studied.[21] Shortly after Charles Ferris was confirmed as chairman of the FCC, the Commission assembled a newly constituted children's television task force and set about to reactivate the children's proceeding. In July of 1978, the Commission formally adopted a Second Notice of Inquiry in the children's television proceeding.[22] Noting that the Commission had received conflicting data from various parties with respect to broadcasters' compliance with the Policy Statement, the Notice sought specific information on such topics as the overall amount of programming aired for children, the amount of educational and informational programming aired for children, age-specific programming, scheduling, commercialization, separation of program matter from commercial matter, host selling, and product tie-ins. In addition to these direct references to the standards of the Policy Statement, the Notice sought additional comment on the definition of children's programs, the type of information thought necessary to monitor licensee compliance with the children's guidelines, and the economics of children's television programming and advertising.

While waiting for comments from interested parties, the children's television task force was conducting its own research with respect to stations' voluntary compliance with the Policy Statement. A major study, done under contract by Dr. John Abel of Michigan State University, compared the amounts of children's television programs on commercial television stations during the 1973-74 television viewing season and the 1977-78 television viewing season.[23] Other research projects initiated by the task force included studies on children's weekday television viewing patterns,[24] the amount of instructional television programming aired during the 1973-74 and 1977-78 television seasons,[25] non-program material time aired on Saturday morning children's programs,[26]

and separation devices utilized on Saturday morning children's programs.[27]

After a year of exhaustive study and the receipt of thousands of comments, the children's television task force issued its controversial study in October, 1979.[28] With respect to the overall amount of children's programming, the Task Force reported that between the 1973-74 and 1977-78 television seasons, the amount of programming devoted to children aired on the average broadcast station had increased by less than one hour per week. This rise was attributed solely to increases in children's programming on independent television stations. No increase was found on network-affiliated stations.[29] The staff also found that no significant increase had occurred in the amount of educational and instructional programs for children aired by licensees.[30] Although some independent stations in the top fifty television markets made some increases in the number of age-specific programs aired, the staff found that no measurable increase in the airing of age-specific programming had occurred.[31] With respect to the scheduling of children's television programming, the task force reported that some movement away from weekend scheduling had occurred, although the shift was due primarily to the counter-programming strategies of the independent television stations. In those markets served soley by network affiliates, most children's fare was still seen on weekend mornings when only eight percent of child viewing occurs.[32] In light of all this data, the task force concluded that broadcasters had not complied with the programming policies defined in the Policy Statement.[33]

With respect to the advertising policies, the broadcasters fared much better in the analysis of the task force. The staff found basic compliance with the commercial time guidelines for children's programming.[34] Additionally, broadcasters generally were in compliance with the Commission's policies on

host-selling, product tie-ins, and separation devices.[35] Given these findings, plus the fact that the Federal Trade Commission was involved in a much more comprehensive children's advertising inquiry, the Commission suspended further consideration of children's advertising issues.[36]

Armed with the report of the children's television task force, activist chairman Charles Ferris garnered sufficient support from the other Commissioners to adopt a wide-ranging Notice of Proposed Rule Making regarding children's television programming.[37] The Notice summarized the findings of the task force Report and set forth five regulatory options for dealing with the television industry's noncompliance with the voluntary programming guidelines.

The first option proposed to rescind the 1974 Policy Statement and rely on other program sources for children's programming. Implicit in this option was the notion that, because the economic incentives of advertiser-supported broadcasting do not encourage the provision of specialized programming for children, commercial broadcasters should not be burdened with a special oblication to serve children. Instead, the Commission would rely on public broadcasting, federally funded children's programs, cable television, subscription television or ". . . any combination of other program sources to meet the demand for more age-specific educational programming for children."[38] Because many of these alternative sources were not available to many parts of the country, this option was viewed as a long-term solution at best.

The second option called for maintaining the Policy Statement as it was originally written or in some modified form. Given the Commission's concerns over the limits of its authority to regulate in the sensitive area of programming, this option was offered as a fall-back position that was legally safe. In addition to retaining the 1974 Policy Statement, the Commission proposed that

the license renewal form might be modified in order to obtain more comprehensive information on programming for children. Also included in this second option was a proposal to modify the substance of the original Policy Statement to perhaps take into account the availability of children's programming in a particular market when calculating an individual broadcaster's obligation to the child audience.[39]

Mandatory programming rules were the subject of the third proposed regulatory option. This proposal would have mandated that all commercial television broadcasters provide five hours per week of educational programming for preschool children and two and one-half hours per week of educational programming for school-age children. This programming would have to be scheduled between 8:00 a.m. and 8:00 p.m., Monday through Friday. In addressing this option, the Commission invited comment on how broadly "educational" programming should be defined. The Commission noted that, should this option be adopted, licensees would be given considerable discretion in classifying children's programming as educational. The Commission also invited comment on whether the proposed rule should apply to all licensees equally or only to some classes of licensees such as network affiliates or VHF stations.[40]

The fourth option proposed the establishment of children's programming license renewal processing guidelines. Such standards, similar in nature to existing processing guidelines for informational, local, and non-entertainment programming,[41] would have come into play at license renewal time. Any station found not to have complied with the processing guideline (e.g., providing five hours of informational children's television per week) would undergo a more rigorous license renewal procedure. The processing guideline approach would have given the Commission more flexibility than the mandatory rule option.[42]

Option five dealt with a long-range policy of increasing the number of video outlets in the hopes of encouraging the presentation of more diversity in children's programming. The Commission reasoned that if more broadcast outlets were competing for the same audience, programming strategies may change, making it more profitable to present specialized programming to a relatively small audience. Comment was sought on whether this scenario would result from increasing the number of video outlets. The Commission also requested suggestions and opinions on a general strategy that might be undertaken to achieve structural changes to increase the number of outlets in a given market.[43]

The comments received by the Commission were predictable in the positions taken and vociferious in tone.[44] Broadcast interests led the charge in two major areas. First, they vigorously objected to the analysis of the children's television task force and argued instead that in fact commercial television licensees adequately were serving the needs of the child audience. Second, they argued that mandatory programming rules would constitute an unconstitutional infringement on licensees' press and speech freedoms. On the other hand, children's television advocates stated their strong support for mandatory programming regulations or license renewal processing guidelines. Further, such groups saw no legal or constitutional problems with adopting such regulations, which were viewed as the least intrusive means available in the effort to particularize an enforceable children's television standard. Given two polar positions, plus many positions of commenters falling between the poles, the Commission staff, in late 1980, began preparing a decision in the children's proceeding. Before a final position on the issues could be formulated however, the nation's electorate substituted chief executives. This change in national leadership caused an abrupt and distinct change in

direction at the Commission also, with Democrat Chairman Charles Ferris -- a strong advocate of children's programming -- being replaced by Republican Chairman Mark Fowler -- whose regulatory rallying cry was "free the broadcasting 10,000" from intrusive government regulation. As a result, the children's television rule making shifted almost overnight from a high priority, high visibility item to one of very low interest. The members of the children's television task force were reassigned to other duties within the Commission.

The children's television proceeding remained on the back burner until late in 1982 when Action for Children's Television filed a civil suit in United States District Court seeking to force the Commission to complete its work on the rule making.[45] Prompted in part by this legal action and a growing interest in the issue by several prominent United States Congressmen, the Commission "reopened" the children's television proceeding in March, 1983. The Commission held a series of panel discussions in April and permitted the submission of additional written comments in order to update the record. The Chairman of the Commission, Mark Fowler, in answer to Congressional and court inquiries promised that the resolution of the children's television proceeding would be forthcoming no later than the end of 1983.[46]

The Report and Order

True to the chairman's word, the Commission held a meeting on December 22, 1983, during which the children's rule making was discussed and formally terminated. In essence, the Commission rescinded its 1974 Policy Statement and left children's television to the uncertainties of the commercial marketplace. In place of the Policy Statement the Commission left broadcasters with a vague charge to "examine the program needs of the child part of the audience. . .in light of its particular market situation...."[47] In the view of the author, the Commissioners voting in the majority were either completely misguided in

their understanding of the children's television issue or dishonest in their publicly stated reasons for taking the actions adopted.

In reaching its conclusion, the majority first sought to attack and discredit the research and analysis of the children's television task force. The Commission criticized the work of the task force on four major fronts, each of which will be discussed and critiqued in turn. First, the majority found fault with the task force for not considering the growth in raw numbers of commercial television stations and the increased receivability of television signals. The task force had found that the average station had increased the amount of children's programming from the 1973-74 to the 1977-78 television seasons by approximately 7 percent. The majority applied this information to the fact that from 1971 to 1983 there had been a 25 percent growth in the number of stations operating and concluded that the amount of children's programming must have grown considerably.[48] What the majority failed to consider in its simplistic analysis was that the task force qualified its statement regarding the increase in children's programming by making it clear that this increase was due almost exclusively to the changing programming philosophies of independent television stations. The vast majority of stations, those affiliated with the commercial networks, showed virtually no change in the amount of children's programming.[49]

Second, although the Commission was able to pinpoint a 25 percent increase in television outlets between 1971 and 1983, the task force report focused on the period between 1973 and 1978. Thus, the Commission criticized the task force for not considering something wholly outside of its purview. Incidentally, the increase in stations during the window studied by the task force was just 3 percent.[50] Finally, the Commission failed to prove any

correlation between the number of commercial stations in operation and the amount of programming available on any one particular station or even within a television market. In fact, several recent studies indicate that the amount of children's fare regularly shown on commercial stations is insubstantial and declining.

The majority's second attack on the task force report relates to the report's failure to consider the programming available to children via the Public Broadcasting System. Because PBS affiliates reach 90 percent of all television households and program over 2000 hours of children's programming per year, the Commission felt that the PBS efforts could not be ignored in considering the extent to which the child audience was being served.[52] This position, that the responsibilities of commercial broadcasters can be somehow mitigated by the efforts of public broadcasting, conviently ignores the thrust of the children's television proceeding from its inception and displays a reckless abandonment of over forty years of a policy stressing individual licensee responsibility.

From the initial Notice of Inquiry adopted in 1971 through the 1974 Policy Statement and including the 1978 Second Notice of Inquiry, the Commission's focus was the individual commercial licensee's responsibility to the child audience. At no point in the proceeding did the Commission hint that noncommercial broadcasters were involved in the proceeding. The 1974 Policy Statement charged every individual commercial broadcast licensee to improve its commitment to children's television; the charge was not restricted to those stations serving markets where public broadcasting was unavailable.[53] The task force was charged with determining whether individual licensees had complied with the Policy Statement, and this was the task that was undertaken.

The failure of the task force to consider non-broadcast sources of children's programming also is held up by the majority as evidence that the task force report was inadequate. The Commission specifically refers to cable television as a medium that is moving ahead in its service to children. Cablecast programs such as "Kidstime," which is available in 20% of the nation's television households, and "Nickelodeon," which reaches 14 million subscribers, are cited by the Commission as evidence that more programming is available to children than just what is aired on commercial broadcast stations. The Commission also cites the Disney Channel, which currently has over 300,000 subscribers, as further evidence of the cable industry's commitment to children.[54]

At the time the task force report was written, the notion of providing children's television programming on cable was little more than a gleam in the eye of the cable industry.[55] To criticize the task force for not considering these items is to criticize if for not being prescient. Further, reliance on the product of the cable industry to meet the needs of children neglects those families that either cannot afford cable or for whom cable is not available. Typically, the basic cable service that would carry programming such as "Kidstime" or "Nickelodeon" costs around ten dollars per month. The "Disney Channel," which is marketed as an add-on premium serivce, costs an additional ten to twelve dollars per month. Reliance on such services to meet the unique needs of children displays a callous insensitivity to those segments of our society that do not have an additional ten to twenty dollars of disposable income per month to spend on television programming. The Commission cites the fact that several services are available to 20 percent of the population. Given the fact that cable television penetration is currently approximately 40 percent of U.S. television households, that means that roughly half of the

cable systems in the country are not carrying these services. Thus, it is apparent that the Commission's observations in this area constitute nothing more than a makeweight in its feeble attempts to discredit the task force analysis.

The fourth major criticism of the task force report offered by the Commission was the task force's failure to consider the availability of "family" entertainment on commercial broadcast stations. The Commission felt that the Task Force had focused on a very limited array of programming -- that programming intended specifically for the 12 and under audience -- to the exclusion of other programming of interest and value to the child audience. The Commission majority would have included in the analysis that programming which was not only intended for children but which was significantly viewed by children. Such programming would include "The Wonderful World of Disney," "Eight is Enough," and "Little House on the Prairie." This type of programming was viewed by the Commission as being at least as significant as narrowly defined children's programming because it appealed to all family members, thus creating a sense of community among viewers and encouraging family viewing.[56]

Several problems exist with respect to this criticism by the Commission. First of all, the task force, in analyzing only that programming that was specifically designed for children twelve years old or younger, was simply following the Commission's own definition. It was the Commission in 1974, not the task force, that defined children's programming.[57] The majority was criticizing the task force for playing by the Commission's own rules. Furthermore, equating family programming with programming designed and produced specifically for children ignores the basic rationale for having children's programming in the first place. Children suffer, through no fault of their own, from cognitive

disabilities; programming specifically geared to the cognitive level of children is an essential element of service to the child audience. Allowing the commitment to children to be satisfied, even partially, by the airing of programming that, while geared to the family audience, is written and produced without consideration of the child's cognitive limitations, is a total abdication of the children's programming policy.

After listing these perceived deficiencies with the task force report, the Commission concluded that the studies of the task force did not make out a case for "increased regulatory concern or involvement" in the area of children's television. The Commission stated:

> Properly viewed, the adequacy of the programming to which children have access must be based on a consideration of the whole of the video distribution system. Viewing that system broadly and on an overall national basis, we find increases in the children's programming available from the average station, dramatic increases in the number of stations in operation, increases in the availability of these stations through cable carriage and improved station facilities, increased availability of noncommercial programming made possible through the growth of the public broadcasting system, and increased viewing options provided to substantial portions of the population by the operation of cable television systems. In short, there is no national failure of access to children's programming that requires an across-the-board, national quota for each and every licensee to meet.[59]

With this statement, the Commission is abandoning a cornerstone principle of television regulation: that every individual licensee is responsible for meeting the needs of all major segments of the viewing audience. According to the Commission, at least with respect to the child audience, broadcast licensees can now rely on the programming of other outlets within their communities as a basis for deciding not to air children's programming.[60]

As a general matter, individual licensee responsibility for serving the diverse needs of the community has been an unwavering requirement of the Commission and its predecessor agency since the inception of broadcast regulation.[61]

This individual obligation was further stressed in 1960 when the Commission listed fourteen programming elements, one of which was children's programming, that every licensee was expected to address in its quest to serve the public interest.[62] That individual responsibility to serve various segments of the community continues unabated for all television licensees today except for service to the child audience. As Commissioner Rivera cogently pointed out in his dissent to the children's television Report and Order, commercial television has been significantly deregulated, but only with respect to children's television.[63] While use of the marketplace rationale for deregulation may have been appropriate for radio stations, the demographics for television are much different. Significant evidence exists that the radio market, characterized by nearly 10,000 outlets nationwide, is fairly responsive to consumer demand and is an appropriate subject for marketplace regulation.[64] Such is not the case, however, for the television market. Most television stations still use the "lowest common denominator" approach to programming in an effort to garner the largest audience share. Even the majority of Commissioners in the children's proceeding admitted that the economics of the commercial marketplace discourage the production of children's programming.[65] And, as pointed out earlier, the alternative program sources cited by the Commission are in many cases either unavailable or available only to those who can afford cable subscription fees of 10 to 20 dollars per month. Relying on a marketplace rationale in this instance is clearly capricious and in itself may be grounds for reversal of the Commission's action.[66]

In addition to its criticism of the task force report, which, according to the Commission, called into question the "factual predicate on which the

recommendations for mandatory programming requirements were based", the majority listed several policy and legal considerations that prevented it from taking further action in the area of children's television. For example, the Commission felt that mandating a specific number of hours of programming would not guarantee that the programming offered would be in some sense beneficial to the viewing child's welfare. Quantity does not necessarily equate with quality, according to the Commission. Because regulating quality would involve the Commission too deeply in sensitive First Amendment areas involving free expression, the Commission felt that mandatory programming standards would be ineffective in achieving the ends desired by children's television proponents.[67] The Commission also recited some legislative history of the Communications Act as support for its position that program quotas of any type have historically been viewed as inconsistent with the statutory scheme of broadcast regulation. Further, the Commission finds serious legal problems with mandatory programming requirements, citing both Section 326 of the Communications Act of 1934, which prohibits Commission censorship of broadcast material, and the First Amendment to the United States Constitution, which prohibits government interference with free expression.[68]

Reasonable people may certainly differ on the policy and legal arguments raised by the Commission. For every policy reason the Commission lists in opposition to continued scrutiny of children's television programming, an equally reasonable counter position may be articulated. As for the legal questions, the issue is certainly not as clear as the Commission would lead one to believe. The promotion of certain program categories has been an established practice of the Commission for decades, and the courts have upheld the use of these program categories in other regulatory contexts.[69] In fact, in affirming

the Commission's 1974 Policy Statement, the court of appeals specifically stated that the imposition of mandatory programming requirements might well be an appropriate regulatory response to the children's programming problem.[70]

The Report and Order ends with a statement of warning to those licensees who choose to ignore children in serving the programming needs of the community. According to the Commission,

> "....we find no basis in the record to apply a national mandatory quota for children's programming. But, there is a continuing duty, under the public interest standard, on each licensee to examine the program needs of the child part of the audience and to be ready to demonstrate at renewal time its attention to those needs. This duty is part of the public interest requirement that a licensee consider the needs of all significant elements of its community. A licensee may consider what other children's program service is available in its market in executing its response to those needs. But a licensee who fails to consider those needs, in light of its particular market situation, will find no refuge in this order.[71]

In his dissent, Commissioner Rivera responds to this statement in the following way:

> Will all due respect, this recitation is nothing more than a fig leaf to clothe the nakedness of the new policy. The Report and Order does not flesh out what broadcasters must do to comply. The barrenness of the vestigial children's obligation becomes quickly evident, however, when one reviews what a broadcaster need not do under the terms of the Report and Order. Licensees need not air programs designed to meet children's unique needs. Nor are they obliged to air programming geared to specific age groups, or children's programs that are informative or educational. Apparently, broadcasters will be found responsive to unique needs of children as long as they air programming that children watch, whatever that may be. In sum, while a broadcaster has a "special" duty to children...nothing special is required to fulfill it![72]

Indeed, in searching through the Report and Order, the dearth of any information upon which some decision might be made as to whether a licensee is meeting its obligation to children is striking. Given the regulatory philosophy of the current majority, it must be concluded that this special obligation cited by the Commission is merely a bone, devoid of meat, cast out in an attempt to mollify the pro-regulatory hordes.

Politically, the Commission is in big trouble over its resolution of the children's television proceeding. Chairman Fowler has been subjected to careful examination before the House Subcommittee on Communications.[73] The Chairman of the subcommittee, Congressman Tim Wirth, has introduced legislation that would in effect codify at least part of the children's task force recommendation. According to Wirth's proposal, broadcast licensees would be expected to air at least five hours of educational children's programming per week at times when heavy child viewing is likely to occur. Several Congressmen support Wirth's legislation, and it is being incorporated into a comprehensive broadcast reregulation bill. Of course, broadcast groups fiercely oppose the measure, and it has become a major stumbling block in forming any consensus on a Communications Act re-write.[74]

No doubt the Commission would have had political problems with its children's television decision even if it had been honest in its rationale. By taking the tack that it chose, however, the Commission invites not only the threat of a legislative reversal, but also a judicial reversal.

A careful reading of Commission documents prepared prior to the Report and Order strongly indicates that all of the arguments listed by the Commission as justification for abandoning children's television are simply makeweights. They are evidence of dishonest decision-making. And the Commission did not need to be dishonest. It is a settled principle of administrative law that independent regulatory agencies may change their policies in pursuit of the public interest, even when there have been no intervening changes in circumstances. As one court stated,

> "....the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes. Two diametrically opposing schools of thought in respect to the public welfare may both be rational.[75]

And in speaking of the administrative activities of the Interstate Commerce Commission, the Supreme Court stated,

> "...the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice....Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adopt their rules and practices to the nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday."[76]

Thus, it is clear from these cases that the Commission did not have to rely on questionable attacks on the task force report and arguable policy positions and legalities. The Commission was free to say what it truly believed: that the federal government has no business telling licensees how their stations should be programmed. That is the philosophy of the present Commission, and it should not have been afraid to say so.

The actions taken by the present Commission in such cases as the television deregulation Notice of Proposed Rule Making,[77] the subscription television rule making,[78] and DBS and LPTV programming policies,[79] all evince a strongly held conviction of the need for an unregulated marketplace and freedom from government interference in the area of program content. Indeed, Mark Fowler has taken the lead in the fight for repeal of the statutory programming restrictions imposed on all broadcasters: the Fairness Doctrine and the Equal Opportunities Rules for political candidates. Clearly, the Commission feels strongly that continuing oversight of individual licensee programming for children is wrongheaded. The Commission simply should have said as much. By relying on misrepresentations and questionable legal logic, the Commission has invited a court challenge that in all liklihood will be successful.

Conclusion

Finally, after almost 13 years, 112,000 comments, 97 volumes of written evidence, and innumerable staff hours, the Commission has terminated Docket 19142. Throughout the proceeding everyone involved realized that there were no easy answers or solutions to the many regulatory problems and social issues raised by the proceeding. Throughout the pendency of the proceeding, the debate was held on a high level and the Commission showed courage many times in attempting to promote children's television while facing the scorn of those it was regulating. Sorrowfully, the present Commission did not display similar courage in making the decision that it thought was right. A devisive, yet in its own way, noble, crusade has ended at the Commission. The public deserved an ending characterized by something better than dishonest decision making.

Endnotes, page 1.

1. Children's Television Programming and Advertising Practices, ___ F.C.C.2d ___, 55 R.R.2d 199 (Report and Order 1983), hereinafter Report and Order.

2. Petition of Action for Children's Television for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly 14 Hour Quota of Children's Television Programs, RM-1569, accepted as a petition for rule making Feb. 12, 1970, mimeo no. 44628.

3. Notice of Inquiry and Notice of Proposed Rule Making, 28 F.C.C.2d 368 (1971), hereinafter Notice of Inquiry.

4. Children's Television Report and Policy Statement, 50 F.C.C.2d 1 (1974), hereinafter Policy Statement.

5. Notice of Inquiry, 28 F.C.C.2d at 368.

6. Id. at 370-72.

7. See n. 4, supra.

8. Policy Statement, 50 F.C.C.2d at 5.

9. For an excellent discussion of children's cognitive limitations see Wartella, "Children and Television: The Development of the Child's Understanding of the Medium", Children's Television Task Force Report, Vol. V, Federal Communications Commission 1979.

10. Policy Statement at 6.

11. Id. at 6-7.

12. Id. at 7-8. The Commission rejected the need to subdivide children's programming into three categories, as was initially urged by ACT. Id.

13. Id. at 8.

14. Id. at 9-11.

15. Id. at 11.

16. Id. at 15-16.

17. Id. at 16-17.

18. Id. at 18.

19. Id. at 18-19.

20. The Commission consistently has rejected challenges to license renewals based on a perceived failure to meet the guidelines contained in the Policy Statement. See, e.g., License Renewal Applications of Certain California Television Stations, 68 F.C.C.2d 1074 (1978); Channel 20, Inc., 70 F.C.C.2d 1770, reconsid. denied, 73 F.C.C.2d 648 (1979); Evening News Association, 89 F.C.C.2d 911 (1982), aff'd sub nom. Washington Association for Children and Television v. FCC, 712 F.2d 677 (D.C. Cir. 1983).

21. Policy Statement at 19.

22. Children's Television Programming and Advertising Practices, 68 F.C.C.2d 1344 (Second Notice of Inquiry 1978).

23. Abel, "Amount and Scheduling of Children's Television Programs: 1973-74 and 1977-78", Children's Television Task Force Report, Vol. IV.

24. Fontes, "Demographic Analyses of Children's Weekday Television Viewing", Task Force Report, Vol. III.

25. Fontes, "The Amount of Children's Instructional Programming Aired During the 1973-74 and 1977-78 Television Seasons", Task Force Report, Vol. III.

26. Fontes, "Non-Program Material Time Aired on Saturday Morning Children's Television", Task Force Report, Vol. III.

27. Fontes, "Study of Separation Devices Used in Saturday Morning Children's Television", Task Force Report, Vol. III.

28. Television Programming for Children: A Report of the Children's Television Task Force, Federal Communications Commission 1979.

29. Task Force Report, Vol. II, pp.11-13.

30. Id. at 18-25.

31. Id. at 28-29.

32. Id. at 42-43.

33. Id. at 88-92.

34. Id. at 50.

35. Id. at 50-60.

36. Task Force Report, Vol. I, p. 5.

37. Children's Television Programming and Advertising Practices, 75 F.C.C.2d 138, (Notice of Proposed Rule Making 1980), hereinafter Notice of Proposed Rule Making.

38. Id. at 147.

39. Id. at 147-48.

Endnotes, p. 111.

40. Id. at 148-49.

41. See 47 C.F.R. Sections 0.283(a)(6), (7), and (8).

42. Notice of Proposed Rulemaking at 149-50.

43. Id. at 150-52.

44. For an excellent summary of the comments submitted in the rule making see Appendix A to the Report and Order.

45. Action for Children's Television v. FCC, Civ. A. No. 82-1366. The District Court dismissed ACT's suit for lack of jurisdiction. ___ F.2d ___, 52 R.R.2d 827 (D.C. Cir. 1982). Subsequently, ACT filed a similar suit in the District of Columbia Court of Appeals, No. 82-2438. This case was dismissed on Feb. 21, 1984, pursuant to the Commission's release of the Report and Order.

46. See "Court orders FCC to end children's rulemaking before end of year," Broadcasting, Nov. 28, 1973, pp. 38-39.

47. Report and Order, 55 R.R.2d at 215.

48. Id. at 206.

49. Task Force Report, Vol. II, pp. 11-13.

50. See 47th Annual Report of the Federal Communications Commission at 96 (1981).

51. See, e.g., the articles cited at n. 19 of Commissioner Rivera's dissent to the Report and Order, 55 R.R.2d at 246.

52. Report and Order, 55 R.R.2d at 207.

53. See generally the 1974 Policy Statement.

54. Report and Order, 55 R.R.2d at 208.

55. See Rudick, "Children's Television: Alternative Media and Technologies", Task Force Report, Vol. V, pp. 57-63. Rudick notes that in late 1979, the two largest children's cable services, Calliope and Nickelodeon, had 860,000 and 800,000 subscribers, respectively.

56. Report and Order, 55 R.R.2d at 208-09. It is interesting to note in this context that a sizable number of children, in their letters to the Commission, stated program favorites such as the Dukes of Hazzard, Saturday Night Live, and the Benny Hill Show. One wonders whether this is the type of programming that the Commission has in mind when it refers to programming that is significantly viewed by children as the type of programming that will satisfy a licensee's obligation to the child audience.

57. Notice of Inquiry, 28 F.C.C.2d at 370; Policy Statement, 50 F.C.C.2d at 5.

58. See n. 9, supra.

59. Report and Order, 55 R.R.2d at 209.

60. The Commission approved a marketplace approach to radio regulation in 1980. Deregulation of Radio, 84 F.C.C.2d 968, reconsid. granted in part, 87 F.C.C.2d 797 (1981), aff'd in part and remanded in part sub nom. Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983). In June of 1983, the Commission proposed a similar action for television licensees. Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 48 Fed. Reg. 37239 (Notice of Proposed Rule Making 1983).

61. See, e.g., Mayflower Broadcast Corp. 8 F.C.C. 333 (1940); cf. Great Lakes Broadcasting Company, 3 F.R.C. Ann. Rep. 32 (1929), rev'd on other grounds sub nom. Great Lakes Broadcasting Co. v. Federal Radio Commission, 37 F.2d 993, cert. dismissed, 281 U.S. 706 (1930).

62. Report re En Banc Programming Inquiry, 44 F.C.C. 2303, 2314 (1960).

63. 55 R.R.2d at 245.

64. See, e.g., FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981), wherein the United States Supreme Court affirmed the Commission's decision not to regulate commercial radio program formats. See also Deregulation of Radio, n. 60, supra.

65. Report and Order, 55 R.R.2d at 206.

66. See Telocator Network of America v. FCC, 691 F.2d 525, 537 (D.C. Cir. 1982).

67. Report and Order, 55 R.R.2d at 209-11.

68. Id. at 211-12.

69. See, e.g., NATPD v. FCC, 516 F.2d 539 (D.C. Cir. 1975).

70. Action for Children's Television v. FCC, 564 F.2d 458, 480 (D.C. Cir. 1977).

71. Report and Order, 55 R.R.2d at 215.

72. 55 R.R.2d at 245.

73. "Hill questions FCC on phone, syn-fin issues", Broadcasting, Feb. 13, 1984, p. 77.

Endnotes, p. v.

74. "Children's programming requirements stall dereg measure", Broadcasting, Feb. 6, 1984, p. 50.

75. Pinellas Broadcasting Company v. FCC, 230 F.2d 204, 206 (D.C. Cir. 1956), cert. denied, 76 S.Ct. 650 (1956). See also, Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970).

76. American Trucking v. Atchison, Topeka and Sante Fe Railway Co., 387 U.S. 397, 416 (1967).

77. See n. 60, supra.

78. Subscription Television Service, 90 F.C.C.2d 341 (1982), reconsid. denied, 53 R.R.2d 646 (1983). In this proceeding the Commission withdrew many of the structural and programming requirement that previously had applied to over-the-air subscription television operations.

79. Direct Broadcast Satellite Service, 90 F.C.C.2d 676, 709-11 (1982); Low Power Television Service, 51 R.R.2d 476 (1982). In these proceedings, the Commission declined to propose or even recommend any special programming requirements for Direct Broadcast Satellites and Low Power Television Stations.